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No. A-705 (80-1285)

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

CARL W. BROWN - - - - - Petitioner

vs.

EARL J. HARTLAGE - - - - Respondent

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

VICTOR L. BALTZELL, JR.
CONNELLY, KAERCHER, BALTZELL & STAMPER
715 Marion E. Taylor Building
Louisville, Kentucky 40202
502/589-2100

Attorney of Record for Respondent

February 25, 1981

WATERFIELD-SONTE CO., 619 W. KENTUCKY—P.O. BOX 3331, LOUISVILLE, KY.

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. A-705 (80-1285)

CARL W. BROWN, - - - - - *Petitioner*

v.

EARL J. HARTLAGE, - - - - *Respondent*

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF KENTUCKY

STATEMENT OF THE CASE

This action involves an election contest between Respondent and Petitioner.

Petitioner was the Republican Party nominee for the office of C-District Commissioner, Jefferson Fiscal Court, Jefferson County, Kentucky, in the general election for said office held on November 6, 1979. The Petitioner's opponent in said election was the Respondent who was the incumbent and the Democratic Party nominee.

During the course of the campaign, the Petitioner specifically promised that he would reduce the salary for the office he was seeking and thereby save the taxpayers of Jefferson County, Kentucky, an amount equal to $3,000 per year for each year he held office.

The Petitioner was certified as the winner of said election.

On December 4, 1979, the Respondent filed a Petition to Void Election. (App. D). The Respondent alleged that the Petitioner's promise to cut the salary fixed by law for the office sought was a violation of KRS 121.055 and therefore, pursuant to KRS 120.015, the election should be declared void.

A trial was conducted and the trial court returned its Findings of Fact, Conclusions of Law and Opinion on February 6, 1980. (App. C). Therein, the court rejected each and every defense raised by the Petitioner, including the allegedly available defense of retraction.

Further, the trial court found and concluded that the Petitioner had clearly violated KRS 121.055 of the Kentucky Corrupt Practices Act and, "in keeping with the seriousness of the condemnation" of Petitioner's conduct, the court taxed the costs of the action against the Petitioner. (App. C, p. 29). However, the trial court did not void the election of the Petitioner. A Judgment consistent with the foregoing was entered on February 12, 1980. (App. C, pp. 31-32).

The Respondent appealed to the Kentucky Court of Appeals, the intermediate appellate court of Kentucky, claiming as his sole assignment of error that the trial court had erred in not voiding the election when judgment had been entered declaring a violation of KRS 121.055. The Petitioner's attempted cross-appeal was dismissed because it was not properly perfected. (App. A, p. 12).

On August 8, 1980, the Kentucky Court of Appeals rendered its unanimous, unpublished opinion that the trial court erred and that a new judgment should be entered voiding the election of the Petitioner. (App. A).

The Court of Appeals agreed with the trial court's rejection of each and every defense raised by the Petitioner. Further, the Court of Appeals held definitively:

> (1) The inescapable conclusion was that the Petitioner violated the statute;
>
> (2) The trial court's failure to void the election was clearly erroneous;
>
> (3) Retraction of such an illegal promise is no defense under the law of Kentucky;
>
> (4) The Petitioner was not fairly elected even though the fairness of the election is irrelevant when such a violation is present;

The Petitioner's rehearing petition was denied by the Court of Appeals. His Motion for Discretionary Review by the Supreme Court of Kentucky was unanimously denied. (App. B).

On additional fact should be clarified. The Petitioner continues to the point of his Petition here to assert, in his words, his "immediate and complete retraction" of the illegal promise. As the Court of Appeals held, retraction is not a defense under Kentucky law. In any event, the trial court best described Petitioner's so-called "immediate and complete retraction" as follows:

". . . The retraction press conference of August 19, 1979, when reviewed, was not that of a remorseful penitent. The retraction statement did not admit a violation or that the statements were violations, but that the statements raised a reasonable question of violation as a result of silly law. The retraction accused the branches of government of being in cahoot with one another and scratching one another's back." (App. C, pp. 23-24).

SUMMARY OF ARGUMENT

Despite the Petitioner's vigorous line-drawing in his attempt to create a legitimate federal question, this case has never involved anything more than the Petitioner's clear violation of a Kentucky corrupt election practice statute. No federal question or constitutional issue is present.

ARGUMENT

Certainly no citation of authority is necessary to support the statement that the Commonwealth of Kentucky is a sovereign state charged with the duty and clothed with the power to govern and to maintain its own separate branches of government.

Specifically, with reference to candidates for public office, Sections 150 and 151 of the Kentucky Constitution, respectively provide:

"Every person shall be disqualified from holding any office of trust or profit for the term for which he shall have been elected who shall be convicted of having given, or consented to the giving,

offer or promise of any money or other thing of value, to procure his election, or to influence the vote of any voter at such election . . ." (Section 150)

"The General Assembly shall provide suitable means for depriving of office any person who, to procure his nomination or election, has, in his canvass or election, been guilty of any unlawful use of money, or other thing of value, or has been guilty of fraud, intimidation, bribery, or any other corrupt practice, and he shall be held responsible for acts done by others with his authority, or ratified by him." (Section 151)

In response to this constitutional mandate, the General Assembly of Kentucky enacted a number of specific statutory prohibitions which have been periodically re-codified. Of course, one of those provisions, KRS 121.055, is the statute applicable here. KRS 121.055, re-codified by the 1980 General Assembly of Kentucky, provides in pertinent part:

"No candidate for . . . election to any state, county, city or district office shall . . . promise . . . money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person."

In addressing the issue of what constitutes a violation by a candidate of this statute, the highest court of Kentucky has held conclusively and repeatedly that a promise by a candidate to serve for less than his salary fixed by law is prohibited. *Sparks* v. *Boggs*, Ky., 339

S. W. 2d 480 (1961); *Kluemper* v. *Zimmer,* Ky., 41 S. W. 2d 1111 (1931); *Owsley* v. *Hill,* Ky., 275 S. W. 797 (1925) (Distinguished because the candidate's salary was not fixed by law).

This long-standing interpretation then is as much an integral part of the Kentucky statutory proviso as is this Court's approved interpretation of any Act of Congress. *Gulf, C. & S. F. R. Co.* v. *Moser,* 275 U. S. 133 (1927); *Allied Stores of Ohio* v. *Bowers,* 358 U. S. 522 (1959).

While the justification for this prohibition is clear enough from the Constitution, statutes and decisions of the highest court of Kentucky, it seems appropriate to set out the following opinion of Mr. Justice Brewer, formerly of this Court, as delivered in the case of *State* v. *Elting,* 29 Kan. 397, and as cited by the Supreme Court of Montana in *Tipton* v. *Sands,* Mont., 60 P. 2d 662, 106 ALR 474 (1936):

> "When a candidate gives an elector personally money or property, there is a direct attempt to influence his vote by pecuniary considerations. The expectation is that such vote will be controlled, not by the elector's judgment of the fitness of the candidate for the office, but by the pecuniary benefit he has received. In other words, it is money and not judgment which directs the ballot; and so the election turns not on considerations of fitness or public good, but of private gain. Let such be tolerated, and elections will be simply the measure of the size of the candidates' purses . . ."
>
> "Salaries are paid by taxation, and when a candidate offers to take less than the stated salary,

he offers to reduce pro tanto the amount of taxes which each individual must pay. If the candidate went to each elector and offered to pay one dollar of his taxes, that clearly would be direct bribery; and when he offers to take such a salary as will reduce the tax upon each taxpayer one dollar, he is indirectly making the same offer of pecuniary gain to the voter; so that those cases rest upon the simple proposition that the election of a candidate for office cannot be secured by personal bribery offered directly or indirectly to the voter. . . ."

". . . The theory of popular government is that the most worthy should hold the offices. Personal fitness—and in that is included moral character, intellectual ability, social standing, habits of life, and political convictions—is the single test which the law will recognize. That which throws other considerations into the scale, and to that extent tends to weaken the power of personal fitness, should not be tolerated. It tends to turn away the thought of the voter from the one question which should be paramount in his mind when he deposits his ballot. It is, in spirit at least, bribery, more insidious, and therefore more dangerous, than the grosser form of directly offering money to the voter."

In the final analysis, there is nothing unclear or vague about the literal and interpreted proviso of KRS 121.055. It is specifically the law of Kentucky that a candidate cannot *promise* to serve for less. Neither the statute as written nor interpreted in any manner prohibits the exposition by a candidate of his views on legitimate public issues.

By a convoluted attempt to apply a number of inapplicable decisions of this Court to the matter at bar, the Petitioner in effect asserts that he may promise to serve for less because he "spoke" the promise. At the risk of overkill, would the Petitioner contend that he could, once elected, threaten a public employee with termination if the employee did not support him in his re-election bid; simply because he "spoke" the threat?

Plainly, this is not a First Amendment case presenting a legitimate federal question of any kind. It is a mere local election contest case, the outcome of which is dependent exclusively upon the application of the Kentucky Constitution and a specific Kentucky statute. *Taylor* v. *Beckham,* 178 U. S. 548 (1900); *Elder* v. *Colorado,* 204 U. S. 85 (1970).

It was the determination of both the trial court and the Court of Appeals of Kentucky that Petitioner violated the statute. He presented no recognized or valid defense to his violation. Therefore, under Kentucky law, his election is void. (KRS 120.015).

CONCLUSION

There being no special and important reason nor federal question presented by the Petitioner for this Court to consider this matter further, the Petition should be denied.

Respectfully submitted,

VICTOR L. BALTZELL, JR.
CONNELLY, KAERCHER, BALTZELL & STAMPER
715 Marion E. Taylor Building
Louisville, Kentucky 40202
Phone: (502) 589-2100

Counsel for Respondent

APPENDIX

APPENDIX A

OPINION RENDERED: AUGUST 8, 1980; 10:00 A.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 80-CA-385-MR

EARL J. HARTLAGE - - - - - - *Appellant*

v.

CARL W. BROWN - - - - - - - *Appellee*

Appeal from Jefferson Circuit Court
Honorable Michael O. McDonald, Judge
Action No. 79-CI-11292

REVERSING

BEFORE: VANCE, HOGGE and GUDGEL, Judges.

HOGGE, JUDGE: On November 6, 1979, Carl W. Brown defeated Earl J. Hartlage in an election for Jefferson County Commissioner for the C-District. Hartlage contested the election of Brown on the grounds of a public statement made by Brown and his running mate, Dr. Bill Creech, which he alleged violated the Kentucky Corrupt Practices Act. Brown and Creech had stated at a televised press conference on August 15, 1979 that they intended to cut their own salaries by $3,000.00 per year if elected. In an August 19, 1979 news conference, after being alerted to possible legal questions, they retracted the statement. Hartlage contended that the statement violated KRS 121.055. The Jefferson Circuit Court, although finding a violation of this section of the Corrupt Practices Act, adjudged

pursuant to KRS 120.165(4) that Brown had been fairly elected and refused to void the election. Hartlage appeals. A cross-appeal filed by Brown has been dismissed by reason of his failure to file a supersedeas bond.

The trial court found that Brown violated KRS 121.055. KRS 121.055 provides:

> No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or made a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral support of that person in any election, primary or nominating convention, and no person shall demand that any candidate make such a promise, agreement or contract.

The appellee, by his brief and oral argument, insists that the trial court erred in this holding and also its holding that the appellant could maintain this contest action as appellant himself, "violated certain provisions of the Corrupt Practice Act." Both these arguments appear to be matters to be considered on cross-appeal, which has previously been dismissed in this case by this court. Be that as it may, we agree with the finding of the trial court that all the defenses raised by the appellee "failed to block Hartlage from asserting the claim in the Petition either legally or equitably." The appellee either failed to prove his asserted defenses, or there had been substantial compliance or the violation, if any, was "de minimis."

Appellee contends that the trial court erred in determining that Brown had violated KRS 121.055. He relies

on *Owsley* v. *Hill*, 210 Ky. 285, 275 S. W. 797 (1925). In that case Hill, a candidate for county attorney, proposed to have the fiscal court reduce the salary of the office by $400.00, and to have the court allot that sum to the county road fund. (The salary for the term of office for which Hill was campaigning had not been set in the manner required by law.) In that case, the statement was held not to be a violation of the Corrupt Practices Act.

After the decision in *Owsley* v. *Hill, supra,* the court interpreted KRS 123.040, a statute with wording almost identical to KRS 121.055, in *Sparks* v. *Boggs,* Ky., 339 S. W. 2d 480, 484 (1960). In that case, it was held that a promise by candidates for the office of city commissioner, whose salaries were fixed by statute, to serve for $1.00 per year and to vote to have the $2,000.00 savings to be distributed to specified religious, educational, charitable and recreational programs violated the Corrupt Practices Act. The election was held to be void. The court explained its holding as follows:

> It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act. To hold otherwise would permit the various elective public offices to become filled by those who would purchase their election thereto by making the most extravagant bid. The auction method of choosing a public officer would supplant the personal fitness test. Eventually most of the public offices would be occupied by the opulent, who could afford to serve without pay, or by the ambitious, who would serve only for the pittance of honor attached

to the office, or by the designing grafter, who would surely obtain his remuneration by methods which would not bear scrutiny. Under such a system good government would certainly vanish from every subdivision of the state.

In *Sparks* v. *Boggs*, the court explained the distinction between that case and *Owsley* v. *Hill, supra*, which resulted in a different disposition of the litigation:

> *The material difference* between the case of *Owsley* v. *Hill*, and the one at bar is that the annual salary of a commissioner for Hazard *had already been fixed by law* for the new term, whereas such had not been done in respect to the county attorney's office in controversy in *Owsley* v. *Hill*.
>
> . . . .
>
> As their rate of pay had already been legally fixed at $500 per year, the amount of salary they were entitled to receive upon taking office could not be altered. Section 161 of the Constitution of Kentucky plainly prohibited such contemplated action upon their part. The pertinent language of that section reads: "The compensation of any city, county, town, or municipal officer shall not be changed after his election or appointment; or during his term of office; * * *." The word "changed" implies that the compensation of an official may not be scaled up or scaled down. See also Section 235 of the Constitution of Kentucky. In view of the quoted constitutional inhibition, appellees gave out to the electorate a pledge they could not abide by. . . . [Emphasis added.]

It is quite apparent that the salary for this office was, like the salary in *Sparks* v. *Boggs*, fixed by law. KRS

64.530(4) states that salaries for county officers elected by popular vote shall be set by the fiscal court "not later than the first Monday in May in the year in which the officers are elected, and the compensation of the officer shall not be changed during the term. . . ." Brown promised to do an act that he could not legally do. Further, his statement was a promise to the taxpayers to reduce pro tanto the amount of taxes each taxpayer must pay. It is stated in *Sparks* v. *Boggs, supra:*

> The general rule on the question before us is thus stated in 43 Am. Jur., Public Officers, sec. 374, p. 159: "An agreement by a candidate for office that if chosen he will discharge the duties of the office without compensation or for a lesser compensation than that provided by law, or will pay part of his salary into the public treasury, is illegal, whether made in good faith or not. The underlying principle of the decisions (on this point) is that when a candidate offers to discharge the duties of an elective office for less than the salary fixed by law, a salary which must be paid by taxation, he offers to reduce pro tanto the amount of taxes each individual taxpayer must pay, and thus makes an offer to the voter of pecuniary gain.
>
> It appears to us there can be no escape from the conclusion that a promise to take a reduction in the salary set by law for an elective public office, or an agreement to discharge the duties of the office gratis, advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act.

It is clear that although Brown may have acted in good faith the trial court correctly held he had in fact violated the Corrupt Practices Act. Under this statute and our case

law, this court cannot reach any conclusion other than the appellee violated KRS 121.055.

What was the effect of that violation? KRS 120.015 provides that in contest actions, where it is alleged that the provisions of KRS 121.055 were violated, and upon trial it appears that the provisions have been violated by the contestee or by others in his behalf with his knowledge, *the nomination or election of the contestee shall be declared void.* Violations of the Corrupt Practices Act through promises similar to the one made by Brown resulted in voiding of elections in *Draughn* v. *Martin,* Ky., 350 S. W. 2d 161 (1961); *Sparks, supra,* and *Kluemper* v. *Zimmer,* 240 Ky. 225, 41 S. W. 2d 1111 (1931). We find no exception in the statute where the statement is retracted, nor do we find any Kentucky case indicating that retraction is a defense. Although the retraction received similar publicity, there is no way of knowing whether it reached the same members of the voting public who heard the original statement. In litigation initiated to compel the Nebraska Secretary of State to accept one Burkett's filing as a candidate, the Supreme Court of Nebraska held that Burkett should not be on the ballot in spite of his offer to repudiate a statement that he would serve without pay so long as the budget remained unbalanced. *State ex rel. Burkett* v. *Swanson,* 291 N. W. 481 (Neb. 1940). We hold that the retraction did not constitute a defense.

The trial court held, and appellee insists, that KRS 120.165(4) is inconsistent with KRS 120.015 and applying KRS 120.165(4) after reviewing the whole record, Brown was fairly elected and KRS 120.165(4) overcomes the mandatory application of KRS 120.015.

These conclusions and holding are clearly erroneous. KRS 120.165(4) has no applicability to this action as this contest was brought under and tried under KRS 120.015. This latter statute specifically treats the violation of the

Corrupt Practices Act, charged herein, viz. KRS 121.055. As between legislation of broad and general nature and legislation dealing minutely with specific matter on the other hand, the specific prevails over the general. *City of Bowling Green* v. *Board of Education of Bowling Green Independent School District,* Ky., 443 S. W. 2d 243, 247 (1969). If there is any inconsistency, which we fail to find, then the inconsistency must be resolved in favor of the specific statute, KRS 120.015, which mandatorily requires voiding of an election where KRS 121.055 is violated by the contestee.

The other considerations of the trial court likewise, have no applicability. As previously discussed in this opinion, retraction of the illegal statement, and no retreat from the retraction, is of no consequence under the law of this state; likewise there is no authority to disregard a mandatory statute because of balancing the violation against disenfranchisement, presumption of will of the people and defeat of Brown's running mate who made the same statements. Neither can we agree that Brown was fairly elected in face of his violation of the Corrupt Practice Act.

The law and courts look with disfavor on disfranchisement and this is very true in this case. Although considerations of good faith and balancing of rights may be proper in a contest under KRS 120.165(4), they have no applicability here because, as already pointed out, this action was based on violation of KRS 121.055, one of the specifically identified prohibited acts under KRS 120.015. There is no authority under this section to entertain such defenses. The only result the court can adjudge is to void this election and to hold otherwise is error. *Sparks* v. *Boggs, supra; Brewer* v. *Compton,* Ky., 122 S. W. 2d 1024 (1938).

The final question for consideration is whether Brown's statement is protected by the United States Constitution. To hold that promises to serve at reduced compensation in violation of the Corrupt Practices Act are immune from regulation in view of the provisions of the United States Constitution is to open the door to arguments that other statements in violation of the Corrupt Practices Act are protected because they involve speech and self-expression.

> Constitutional rights of liberty of speech and of the press are subject to such reasonable regulations as are necessary to promote and preserve public welfare. The preferred position of freedom of speech does not require legislators to be insensible to claims by citizens to comfort and convenience. A state may punish those who abuse the constitutional freedom of speech by utterances inimical to the public welfare, tending to corrupt public morals, incite to crime, or disturb the public peace. 16 Am. Jur. 2d *Constitutional Law* §409.
>
> It is well settled that the rights of free speech and press are subject to legislative restriction, within proper limits. The First Amendment does not forbid a regulation which ends in no restraint upon expression or in any other evil outlawed by the Amendment's terms and purposes. It has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed. And the prohibition of legislation against free speech is not intended to give immunity for every use or abuse of language, the right of free speech and press does not prevent the punishment of those who abuse this freedom, and does not imply the right to paralyze the means for effective protection of all the freedoms

secured by the Bill of Rights, nor the right to frustrate and defeat the discharge of those governmental duties upon the performance of which the freedom of all depends. 16 Am. Jur. 2d *Constitutional Law* §507.

We hold that the statement was not constitutionally protected.

The judgment is reversed with directions to enter a new judgment voiding the appellee's election.

ALL CONCUR.

Attorneys for Appellant:

VICTOR L. BALTZELL, JR.
CONNELLY, KAERCHER, BALTZELL & STAMPER
219 Marion E. Taylor Building
Louisville, Kentucky 40202

Attorneys for Appellee:

RICHARD D. REMMERS
HANDMAKER, WEBER & MEYER
HENRY S. JOHNSON
R. MICHAEL PITT
2307 Citizens Plaza
Louisville, Kentucky 40202

APPENDIX B

SUPREME COURT OF KENTUCKY

80-SC-770-D
(80-CA-385-MR)

CARL W. BROWN - - - - - - - *Movant*

v.

EARL J. HARTLAGE - - - - - *Respondent*

Jefferson Circuit Court
No. 79-CI-11292

ORDER DENYING DISCRETIONARY REVIEW—
Entered December 9, 1980

The motion of Carl W. Brown for a review of the decision of the Court of Appeals is denied.

Palmore, C. J., and Aker, Clayton, Lukowsky, and Stephenson, JJ., sitting. All concur.

ENTERED: December 9, 1980.

/s/ John S. Palmore
Chief Justice

APPENDIX C

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI11292

EARL J. HARTLAGE - - - - - - - - *Plaintiff*

v.

CARL W. BROWN - - - - - - - - *Defendant*

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND OPINION

This case was tried, pursuant to KRS 120.165, on January 29 and 30, 1980, without a jury, and is of record.

On December 4, 1979, the plaintiff-contestant, Earl J. Hartlage, filed a petition against the defendant-contestee, Carl W. Brown, alleging that Brown violated the Kentucky Corrupt Practices Act, specifically, KRS 121.055. Because of the violation, Hartlage demands that Brown's election to the office of Jefferson County Commissioner, "C" District, be voided, and the office vacated by Brown. (KRS 120.155 restricts the filing of a suit over a contest of a regular election to any candidate, provided that the candidate obtained not less than 25% of the votes cast for the successful candidate. *Dietz* v. *Zimmer,* 231 Ky. 546, 21 S. W. 2d 999 limits the suit for bringing the action to a defeated candidate.)

Both Hartlage and Brown were their respective party's nominees for the office in question from "C" District. "C"

District encompasses an area generally referred to as the southwest portion of Jefferson County, Kentucky. Hartlage was the Democratic nominee, and Brown, the Republican.

In the general election of November 6, 1979, Brown defeated Hartlage, the incumbent, by 10,151 votes. The candidates were voted for by the County-wide electorate; however, their primary races were confined to their respective district.

During the regular election campaign, on August 15, 1979, Brown, along with Dr. Bill Creech, "B" District Republican candidate, held a televised press conference and made the following statements:

Mr. Brown: ". . . with state law limiting their authority and responsibility (referring to County Commissioners) to legislation (KRS 67.080), it is clear that their jobs are simply not worth $20,000 a year each. It is ludicrous that part-time Commissioners nevertheless see fit to pay themselves the same amount as that paid the full-time County Judge. The mere fact that state law allows such outrageous levels of remuneration does not in itself justify these payments."

". . . using the gray fringes of the law for his own personal gain, Hartlage led the move to funnel County tax dollars into Commissioners' pockets."

Brown, during the same conference, supported and acquiesced in the following statement of Dr. Bill Creech:

Dr. Creech: "We abhor the Commissioners' outrageous salaries, and to prove the strength of our convictions, one of our first official acts as County Commissioners will be to lower our salary to a more realistic level. We will lower our salaries, saving the taxpayers $36,000 during our first term of office, by $3,000 each per year."

Later in the conference Brown went on to say, "These 2 proposals—cutting our own salaries and reorganizing the

Commissioners' office staff will save the taxpayers over $172,000 during our first term of office."

The Sunday after the press conference, a friend of Brown called to inform him that he may have violated the Corrupt Practices Act by making the statements mentioned in the press conference. Brown, a lawyer, personally researched the matter and concluded that a valid question could be raised on the statements as to whether they were violations. A retraction by Brown and Creech was made at a televised press conference on August 19, 1979. Partial statements are as follows:

"We are men enough to admit when we've made a mistake. We have discovered that there are Kentucky Court decisions . . . which indicate that our pledge to reduce our salaries, if elected, may be illegal." ". . . we do hereby rescind our pledge to reduce the County Commissioner's salary, if elected, and instead, pledge to seek corrective legislation in the next session of the general assembly, to correct this silly provisions of state law."

The Court will judicially note that Dr. Bill Creech was defeated by Jim "Pop" Malone in the regular election for "B" District Commissioner.

There is no Kentucky case law concerning the effect, if any, of a repudiation or retraction of this type pledge or promise to the public. However, a Nebraska case, *State ex rel. Burkett* v. *Swanson*, 291 N. W. 481 (1940) stands for the proposition that a withdrawal of a statement of this nature cannot be treated as a defense, but this precedent is not binding upon the Court.

The Court will comment on the retraction and repudiation of the offer to reduce the salary. The retraction press conference of August 19, 1979, when reviewed, was not that of a remorseful penitent. The retraction statement did not admit a violation, or that the statements were violations, but that the statements raised a reasonable question of

violation as a result of silly law. The retraction accused the branches of government of being in cahoot with one another and scratching one another's back. Brown and Creech further said that if there was a violation in what was said, Hartlage caused the violation by doubling his salary after his previous election.

The Petition further alleged that Brown made other statements in public concerning the salary reduction pledge; however, the Court finds no substance to this allegation. The evidence is plain that whenever the issue was discussed again, it was repudiated, and when it was discussed, the matter in controversy was put to Brown either by Mr. Hartlage at subsequent meetings of candidates, or by persons from an audience in a public forum. The evidence reveals no retreat by Brown from the retraction and repudiation that was publicly made August 19, 1979.

Brown, by his response to this action, offered various defenses to the allegation in the Petition. He admitted the statements were made on August 15, 1979. He asserts that the reduction in salary is within the confines of prescribed law; that there was no claim to serve without compensation, but contends the salary should be consistent with the duties of the office, which would dictate a reduction in salary; that Hartlage has no standing to bring the suit because he violated the Corrupt Practices Act himself, under KRS 120.-155, and therefore, the equitable doctrine of "clean hands" would apply and deny Hartlage's right to contest this election. Brown further contended that the retraction of August 19, 1979, cured any violation, if one existed.

The Court finds the defense is without substance. It was alleged that Hartlage made an agreement, contrary to law, with the Greater Louisville Central Labor Council, and with the Department of Human Services Employees Association for his endorsement in the election. The alleged agreement concerned a commitment by Mr. Hartlage over

collective bargaining rights for governmental employees. Actually, the evidence was to the contrary. It's also alleged that Hartlage failed to make election finance disclosures in a proper way by not filing the reports with the County Clerk, although the reports had been filed with the Registry. This was found to exist but was cured within a reasonable time after it was discovered, and the law was complied with. Therefore, the Court finds substantial compliance on this point. (See *Roberts* v. *Byrd,* 344 S. W. 2d 378 (1961).)

The only violation of Hartlage, about which Brown complains, really worth comment is the failure of Hartlage to have the disclaimer on his campaign locomotive. But this violation is so insignificant it does not reach the dignity of precluding Hartlage from bringing this suit. This violation is found by the Court to be *de minimis.*

In all, the defenses raised fail to block Hartlage from asserting the claim in the Petition either legally or equitably.

Therefore, one issue now before the Court is whether the pledge of Brown, in the statement of August 15, 1979, is a violation of the Corrupt Practices Act.

KRS 121.055 states as follows:

> *Candidates prohibited from making expenditure or loan, or agreement as to action when elected, to secure vote or support.*—No candidate for nomination or election to any state, county, city or district office shall expend, pay, promise, loan or become pecuniarily liable in any way for money or other thing of value, either directly or indirectly, to any person in consideration of the vote or financial or moral support of that person. No such candidate shall promise, agree or make a contract with any person to vote for or support any particular individual, thing or measure, in consideration for the vote or the financial or moral sup-

port of that person in any election, primary or nominating convention, and no person shall demand that any candidate make such a promise, agreement or contract.

The Court answers the above question in the affirmative. *Sparks* v. *Boggs,* 339 S. W. 2d 480 (1960), is explicit on this point. It states, "It appears to us there can be no escape from the conclusion that a promise to take a reduction in salary set by law for an elected public office . . . advanced by one to induce votes for his candidacy, is so vicious in its tendency as to constitute a violation of the Corrupt Practices Act."

This leads us to the question as to whether the Commissioner's salary, as mentioned by Brown in his pledge, was set by law. There is no question in the Court's mind concerning this issue either, and the Court finds that the Commissioner's salary was set by law. KRS 64.530(5) fixes the monthly compensation of County officers elected by popular vote. The Commissioners are therein included. Further, KRS 64.527 permits the equating of Commissioners' salaries to present value of the purchasing dollar, or adjusting the compensation based upon the "rubber dollar" theory. To otherwise find would require manipulation of the law by legal gymnastics which this Court is unable to perform.

So, the Court having found there was a promise to reduce Brown's salary as set by law, it naturally follows there was a violation of the Corrupt Practices Act, specifically, KRS 121.055, and this finding is in compliance with the rationale of *Sparks* v. *Boggs, supra.*

Now, the question is whether the election of Brown should be voided and his office vacated. Hartlage argues that it's an automatic voiding of the election and vacating of the office if a violation of this nature is found to exist.

The cases cited refer to this type of promise as a bribery, and the only remedy, according to Hartlage, is the relief demanded by his Petition. Hartlage is not without legal support in that KRS 120.015 states that if a violation occurs the election shall be declared void.

The Court generally agrees with Hartlage except for the end result. The Court does not adjudge that the election should be voided and the office vacated. The Court's explanation is as follows:

There is reasoning given to us in *Owsley* v. *Hill*, 275 S. W. 797 (1925), that if the promise to reduce salary is made to the public at large, there is no violation. All other cases cited were promises of a reduction in salary for the benefit of specific groups and to accomplish a particular purpose. The beneficiaries in those cases included widows and orphans, religious groups, retarded children, Little League baseball, the hiring of a city manager, and so forth. In *Owsley* the candidate promised to reduce to a previously fixed sum and transfer the savings to a road fund for the County. Our highest Court said, "We cannot feel that this statute refers to promises made the entire people, and to hold otherwise would prevent any candidate from pledging himself to support measures designed to correct evils of which the people were complaining."

The *Sparks* case, however, appears to overrule *Owsley*, so it is inescapable to conclude that a violation of the Corrupt Practices Act did not occur. But the Court resists the proposition that automatic voiding of the election must necessarily follow because the Court further concludes that the law requires more.

KRS 120.165(4) states:

> If it appears from an inspection of the whole record that there has been such . . ., *bribery* . . . in the conduct of the election that neither contestant nor con-

> testee can be judged to have been fairly elected, the Circuit Court . . ., may adjudge that there has been no election.

The Court is led to believe that this statutory provision is inconsistent with KRS 120.015. KRS 120.165(4) speaks of bribery and the *Sparks* case and *Kluemper* v. *Zimmer*, 41 S. W. 2d 1115 (1931), declare these promises to be bribery. Applying KRS 120.165(4) further, and reviewing the whole record, considering the following:

1) the almost immediate retraction, by Brown;
2) no subsequent retreat by Brown from the retraction;
3) balancing the violation against disenfranchisement of thousands of votes;
4) the presumption of the will of the people in the election process; and
5) the defeat of Dr. Creech, Brown's running mate, who had made the same statements in the same county-wide election;

the Court adjudges, pursuant to KRS 120.165(4), that Brown was fairly elected. KRS 120.165(4) overcomes the mandatory application of KRS 120.015.

Previously, the Court faintly criticized Brown for saying the law is silly. Therefore, the Court will refer to the law as unique when the Court tries to grasp the reasoning of the legislature in these statutes. Under KRS 120.015, and since only a defeated candidate may file suit to contest the election, and further conditioned upon the defeated candidate obtaining 25% of the successful candidate's votes cast, if the successful candidate's promise is big enough, and the defeat is resounding enough, then there can be no contest over the violation.

Therefore, in keeping with the seriousness of the matter as the law so clearly requires, the defendant-contestee, Brown, is adjudged to have violated KRS 121.055; however, for the reasons above stated, his election is not voided. Further, in keeping with the seriousness of the condemnation of his campaign promise, the costs of this action shall be taxed against him. Either counsel may prepare judgment consistent herewith, with notice to opposing counsel.

/s/ Michael O. McDonald
Judge

Date:

cc: Victor L. Baltzell, Jr.
Richard D. Remmers

JEFFERSON CIRCUIT COURT

DIVISION SEVEN

No. 79-CI-11292

EARL J. HARTLAGE - - - - - - - *Plaintiff*

v.

CARL BROWN - - - - - - - - - *Defendant*

JUDGMENT

This cause having come on for a hearing before the Court, arguments for the Plaintiff and the Defendant having been fully presented, and the Court having entered its findings of fact and conclusions of law and opinion on February 6, 1980,

IT IS HEREBY ORDERED AND ADJUDGED AS FOLLOWS:

1. The findings of fact and conclusions of law and opinion entered on February 6, 1980, are incorporated herein by reference as if set out verbatim herein;

2. The relief sought in the petition is denied;

3. The election of Carl W. Brown as Commissioner of the Jefferson County Fiscal Court from C District, Jefferson County, Kentucky, is upheld;

4. The Defendant, Carl W. Brown, shall pay the costs of this action;

5. That pursuant to CR 54.02 this is a final and appealable order and there is no just reason for delay in its entry or execution.

/s/ Michael O. McDonald
Judge

Date: February 12, 1980

Tendered by:

/s/ Richard D. Remmers
Counsel for Carl W. Brown
Henry S. Johnson
R. Michael Pitt
2307 Citizens Plaza
Louisville, Kentucky 40202
589-6300

Have Seen; Notice of Filing Waived:

/s/ Victor L. Baltzell, Jr.
Counsel for Earl J. Hartlage
200 Marion E. Taylor Building
Louisville, Kentucky 40202
589-2100

APPENDIX D

JEFFERSON CIRCUIT COURT

SEVENTH DIVISION

No. 79CI-11292

EARL J. HARTLAGE - - - *Plaintiff-Contestant*
4115 Bramers Lane
Louisville, Kentucky 40216

v.

CARL W. BROWN - - - - - *Defendant-Contestee*
3431 Heatherfield Drive
Louisville, Kentucky 40216

PETITION TO VOID ELECTION

Comes the Plaintiff-Contestant, Earl J. Hartlage, and for his cause of action, states as follows, to-wit:

1. That Plaintiff-Contestant and Defendant-Contestee at all times herein mentioned were opposing candidates in the general election held on Tuesday, November 6, 1979, for election to the office of Jefferson County Commissioner, C District, Jefferson County, Kentucky, the Plaintiff-Contestant and Defendant-Contestee being candidates for election to that office by reason of their nomination as candidates thereto in the preceding primary election held on Tuesday, May 29, 1979.

2. That the Defendant-Contestee, personally and/or through others in his behalf with his knowledge, on or about August 15, 1979, and at other times prior to said election, in Jefferson County, Kentucky generally and publicly de-

clared, pledged and/or promised that, if elected, he would reduce the salary fixed by law for the holder of said office and that he would serve in such capacity as county commissioner for an amount less than that fixed by law for the compensation of the holder of said office.

3. That the aforesaid declaration, pledge and/or promise constituted a corrupt election practice in violation of KRS 121.055.

4. That by reason of the Defendant-Contestee's violation of KRS 121.055, the election of the Defendant-Contestee to the office of County Commissioner, C District, Jefferson County, Kentucky, shall be declared void as is provided in Kentucky Revised Statute 120.015.

5. That at all times herein mentioned, the Plaintiff-Contestant did not violate any of the provisions of KRS 121.055 or any other section of the Kentucky Revised Statute which sets forth a corrupt election practice.

6. That the Plaintiff-Contestant is duly qualified to contest the instant election by reason of his candidacy for said office and by reason of the number of votes cast for Plaintiff-Contestant in said election was greater than twenty-five percent (25%) of the number of votes cast for the Defendant-Contestee in said election.

7. That pursuant to Kentucky Revised Statute 120.165 (1), the within action shall have precedence over all other cases pending before the Jefferson Circuit Court.

WHEREFORE, the Plaintiff-Contestant, Earl J. Hartlage, demands as follows:

1. That Judgment be entered declaring void the election of the Defendant-Contestee to the office of Jefferson County Commissioner, C District, by reason of his violation of KRS 121.055 and Section 150 of the Kentucky Constitution, and that, therefore, a vacancy exists in said office;

2. That he recover his costs herein expended;

3. That he receive any and all other relief to which he may appear to be entitled.

Connelly, Kaercher, Baltzell & Stamper

/s/ Victor L. Baltzell, Jr.
Attorney for Plaintiff-Contestant
219 Marion E. Taylor Building
Louisville, Kentucky 40202
Phone: 589-2100

I have read the foregoing Petition and the allegations contained therein are true and accurate to the best of my knowledge and belief.

/s/ Earl J. Hartlage
Plaintiff-Contestant

Subscribed and sworn to before me by Earl J. Hartlage, this the 3rd day of December, 1979.

My commission expires: December 13, 1982

/s/ Bert Stamper
Notary Public, State at Large, Kentucky